Supreme Court, U.S.
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No. 04-041307

IN THE

Supreme Court of the United States

KENNETH CHATONE MANOKEY,

Petitioner,

v.

LLOYD L. WATERS, Warden of the Maryland Correctional Institution; J. JOSEPH CURRAN, JR., The Attorney General of the State of Maryland,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Last term, in *Smith v. Massachusetts*, __ U.S. __, 125 S. Ct. 1129, 1134 (2005), this Court held that a judgment of acquittal, granted during a trial, creates an irrevocable double jeopardy bar to continued prosecution – even during that same trial – on the acquitted offense. In this case, at the close of evidence, a state trial court granted a judgment of acquittal on a lesser-included offense and then permitted continued prosecution on the greater offense. This case presents three questions:

(1) May a federal-court, consistent with last term's decision in *Smith*, take an order that was in form and substance (as Respondent concedes) a "judgment of acquittal" and recharacterize it as a "refusal to give an instruction on a lesser-included offense," thereby avoiding a double jeopardy bar to further prosecution?

(2) If two offenses are the "same offense" under *Blockburger v. United States*, 284 U.S. 299 (1932), for purposes of successive prosecution and multiple punishment analyses, is it reasonable to hold that those two offenses are not the "same offense" for purposes of continued prosecution, after acquittal, during a single trial?

(3) If a District Court grants a writ of habeas corpus to an applicant and the grant is appealed by the State, does the applicant need to notice a cross appeal and obtain a certificate of appealability on claims that were rejected by the District Court where the applicant seeks neither to enlarge his own rights nor diminish those of the Respondent, but merely to defend the judgment of the District Court on alternative grounds?

LIST OF PARTIES AND AFFILIATES

Kenneth Manokey, inmate of Maryland Correctional Institution-Hagerstown, is the Petitioner. The Respondent is Lloyd L. Waters, Warden, Maryland Correctional Institution-Hagerstown, who is represented by the Office of the Attorney General of the State of Maryland.

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Petitioner Kenneth Manokey respectfully requests that this Court grant his petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the Circuit Court for Dorchester County, Maryland granting the judgment of acquittal is unpublished and appears at Pet. App. at 38a. The decision of the Circuit Court for Dorchester County, Maryland, denying Mr. Manokey's Petition for Post-Conviction Relief ("PCR") is unpublished and appears at Pet. App. at 39a-41a.

The memorandum and order of the United States District Court for the District of Maryland granting Mr. Manokey's petition for a writ of habeas corpus is unpublished and appears at Pet. App. at 15a-32a. The opinion and order of the United States Court of Appeals for the Fourth Circuit reversing the District Court's grant of the writ of habeas corpus is published at *Manokey v. Waters*, 390 F.3d 767 (4th Cir. 2004), and appears at Pet. App. at 1a-14a. The order of the United States Court of Appeals for the Fourth Circuit denying Mr. Manokey's Petition for Rehearing is dated December 29, 2004, and appears at Pet. App. at 33a-34a.

JURISDICTION

In a decision dated December 2, 2004, the United States Court of Appeals for the Fourth Circuit reversed the District Court's grant of the writ of habeas corpus. *See* Pet. App. at 11a. On December 29, 2004, the Fourth Circuit denied Mr. Manokey's petition for rehearing. *See* Pet. App. at 33a-34a. This Court has jurisdiction to grant a writ of certiorari to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

Maryland Code, Criminal Law, § 3-202 provides:

Title 3. Other Crimes Against The Person
Subtitle 2. Assault, Reckless Endangerment, and Related Crimes
§ 3-202. Assault in the first degree

Prohibited

(a)(1) A person may not intentionally cause or attempt to cause serious physical injury to another.

(2) A person may not commit an assault with a firearm, including: (i) a handgun, antique firearm, rifle, shotgun, short-barreled shotgun, or short-barreled rifle, as those terms are defined in § 4-201 of this article; (ii) an assault pistol, as defined in § 4-301 of this article; (iii) a machine gun, as defined in § 4-401 of this article; and (iv) a regulated firearm, as defined in § 5-101 of the Public Safety Article.

Penalty

(b) A person who violates this section is guilty of the felony of assault in the first degree and on conviction is subject to imprisonment not exceeding 25 years.

Maryland Code, Criminal Law, § 3-204 provides:

Title 3. Other Crimes Against The Person
Subtitle 2. Assault, Reckless Endangerment, and Related Crimes
§ 3-204. Reckless endangerment

Prohibited

(a) A person may not recklessly:

(1) engage in conduct that creates a substantial risk of death or serious physical injury to another; or

(2) discharge a firearm from a motor vehicle in a manner that creates a substantial risk of death or serious physical injury to another.

Penalty

(b) A person who violates this section is guilty of the misdemeanor of reckless endangerment and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding $5,000 or both.

Exceptions

(c)(1) Subsection (a)(1) of this section does not apply to conduct involving:

(i) the use of a motor vehicle, as defined in § 11-135 of the Transportation Article; or (ii) the manufacture, production, or sale of a product or commodity.

(2) Subsection (a)(2) of this section does not apply to: (i) a law enforcement officer or security guard in the performance of an official duty; or (ii) an individual acting in defense of a crime of violence as defined in § 5-101 of the Public Safety Article.

Maryland Rule 4-324 provides:

Motion For Judgment Of Acquittal

(a) Generally. A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment of acquittal shall be necessary. A defendant does not waive the right to make the motion by introducing evidence during the presentation of the State's case.

(b) Action by the Court. If the court grants a motion for judgment of acquittal or determines on its own motion that a judgment of acquittal should be granted, it shall enter the judgment or direct the clerk to enter the judgment and to note that it has been entered by direction of the court. The court shall specify each count or degree of an offense to which the judgment of acquittal applies.

(c) Effect of Denial. A defendant who moves for judgment of acquittal at the close of evidence offered by the State may offer evidence in the event the

motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the defendant withdraws the motion.

CONCISE STATEMENT OF THE CASE

On July 8, 1998, Mr. Manokey was tried to a jury in the Circuit Court for Dorchester County, Maryland ("Trial Court"), on, among others, charges of first-degree assault, Md. Code Ann., Crim. Law § 3-202, and reckless endangerment, *id.* § 3-204. *See* Pet. App. at 17a n.3. At the close of the State's case-in-chief, Mr. Manokey's attorney moved for judgment of acquittal on all counts. *See* Pet. App. at 35a. The Trial Court denied the motion without prejudice. *See* Pet. App. at 37a. At the close of evidence, Mr. Manokey's counsel renewed the motion for judgment of acquittal on all counts. *See* Pet. App. at 37a.

The Trial Court granted the motion as to the reckless endangerment count, but denied the motion on the charges of first-degree and second-degree assault. *See* Pet. App. at 37a-38a. The docket entries that resulted were as follows:

At end of States case, Deft. makes Mt. for Judgment.
Mt. denied.
State's exhibits 1 thru 9, fd. (5,7,9 ID only)
At end of entire case, Deft. renews Mt. for Judgment.
Mt. denied as t Cts. 1 &2; Mt. grtd. as to Cts. 3 & 4.

On July 8, 1998, the jury found Mr. Manokey guilty of first-degree assault and, on September 24, 1998, the Trial Court sentenced Mr. Manokey to, among other things, twenty-five years in prison. *See* Pet. App. at 17a.

Following an unsuccessful direct appeal, Mr. Manokey sought State post-conviction relief, arguing that his conviction on a charge of first-degree assault after he had been acquitted of the lesser-included offense of reckless endangerment violated the Double Jeopardy Clause of the U.S. Constitution. The PCR Court summarily denied Mr. Manokey's double jeopardy claim, *see* Pet. App. at 40a, and the Maryland appellate courts rejected Mr. Manokey's appeals from the denial of this PCR petition.

On March 28, 2002, Mr. Manokey filed a *pro se* application for a writ of habeas corpus under 28 U.S.C. § 2254. *See* Pet. App. at 15a. On May 12, 2003, the District Court granted Mr. Manokey a writ of habeas corpus based on his double jeopardy claim, concluding that reckless endangerment and first-degree assault are the "same offense" under the Double Jeopardy Clause. *See* Pet. App. at 28a, 32a.

On appeal from the District Court's ruling, the Fourth Circuit raised *sua sponte* whether the judgment of the Trial Court had in fact been a judgment of acquittal, and during oral argument, the following exchange took place:

> Judge Williams: Is a state trial court grant a judgment of acquittal on reckless endangerment?
>
> Counsel for Maryland: The state court's ruling was in response to defense counsel's motion for judgment of acquittal. So, the ruling—
>
> Judge Williams: The motion was made but was it granted on that basis? I mean, was it actually granted a judgment of acquittal or was it more in the nature of just insufficient evidence to—

Counsel for Maryland: Well, the trial court—

Judge Williams: — to give a jury instruction on that.

Counsel for Maryland: The trial court indicated— They granted the motion, so it— *for purposes of Maryland state law, it was an acquittal.* That count was then out of the trial.

Judge Williams: For the purposes of double jeopardy it was an acquittal?

Counsel for Maryland: It's— No. It's the respondent's position that it was, that it— *well, it was an acquittal of reckless endangerment, yes. We're not disputing that when the judge acted, he, in fact, granted a motion for judgment of acquittal as to the reckless endangerment count.* So it, when—

Judge Williams: So you— It's your position that it was a judgment of acquittal on the reckless endangerment?

Counsel for Maryland: *We have not contested that that's exactly what it was, Your Honor. I think when the ruling occurs at that stage of trial in response to a defense motion for judgment of acquittal at the end of the state's case, that the court's ruling granting that constitutes a judgment of acquittal, even though, even if the court doesn't say, you know, if the court just says, granted or, you know—*

> Judge Williams: We've had some Federal cases in our court that have not interpreted it being that way. So—
>
> Counsel for Maryland: But this is— I don't—
>
> Judge Williams: This is a state court matter, so—
>
> Counsel for Maryland: Yes, and under the Maryland practice, that's the traditional way of challenging the state's case at the end of—

Excerpt from Oral Argument of May 4, 2004 (emphasis added); *see also id.* (Counsel for Maryland states: "The trial judge granted the motion for judgment of acquittal as to reckless endangerment.").

On December 2, 2004, a panel of the United States Court of Appeals for the Fourth Circuit reversed the District Court's grant of the writ. *See* Pet. App. at 11a. On December 29, 2004, the Fourth Circuit denied Mr. Manokey's petition for rehearing and rehearing en banc. *See* Pet. App. at 33a-34a.

REASONS FOR GRANTING THE PETITION

This case presents two important issues arising out of this Court's recent decision in *Smith v. Massachusetts*, __ U.S. __, 125 S. Ct. 1129, 1134 (2005), in which this Court held that a judgment of acquittal granted mid-trial irrevocably bars continued prosecution – even in that same proceeding – on the acquitted offense ("Continued Prosecution").[1] In addition, as

1. Most cases interpreting the Double Jeopardy Clause involve successive prosecution (in another proceeding) after acquittal or (Cont'd)

discussed below, a writ of certiorari is appropriate to resolve the split among the circuits on whether a petitioner must appeal and seek a certificate of appealability when the District Court grants a writ of habeas corpus, the state appeals, and the petitioner seeks to defend the District Court's judgment on a ground that was rejected by the District Court.

First, this Court should grant a writ of certiorari to: (1) clarify the critical differences between a judgment of acquittal and other similar intra-trial rulings and (2) establish that a court may not – consistent with *Smith*, 125 S. Ct. 1129, and *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) – simply recharacterize a judgment of acquittal as something else in order to avoid a double jeopardy bar. There are a number of rulings that arise during a trial – including evidentiary rulings and orders relating to jury instructions – that require analyses similar in nature to the analysis that takes place when considering a motion for judgment of acquittal. These similarities present the risk that a later-reviewing court may re-label a judgment of acquittal as something else to avoid a bar that would otherwise apply under the Double Jeopardy Clause.

Here, for example, the Fourth Circuit capitalized on the similarities between a trial court's decision not to give a lesser-included offense instruction – which is ordinarily based on a conclusion that there is no evidence on which a reasonable factfinder could convict on the lesser-included offense – and the

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(Cont'd)
conviction on that "same offense" ("Successive Prosecution"), or attempts to impose more than one punishment for the "same offense" ("Multiple Sentences"). *See Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 769 n.1 (1994) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

decision to grant a judgment of acquittal on a lesser-included offense – which is based on a conclusion that the evidence admitted relating to that lesser-included offense is legally insufficient to sustain a conviction – and recharacterized what was unquestionably a judgment of acquittal as a "refusal to give an instruction on a lesser-included offense." Pet. App. at 13a. A judgment of acquittal has a special place in our jurisprudence, and this Court should grant a writ of certiorari to make clear that recharacterization is not an option.

Second, this case raises whether, if two offenses are the "same offense" for purposes of (1) Successive Prosecution cases and (2) Multiple Sentences cases, it can be reasonable to hold that the two offenses are not the "same offense" in a Continued Prosecution case.[2] In other words, the *Blockburger* "same offense" test is, by definition, applied to determine whether two

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2. As the Fourth Circuit explained in the decision below, under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

> A federal court may not grant habeas relief under § 2254 with respect to any claim that was adjudicated on the merits in State court proceedings unless the state-court ruling: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d).

Pet. App. at 3a-4a (internal quotations omitted). For purposes of simplicity, this petition refers to (1) and (2) above as the "reasonableness" test.

offenses, concededly defined by different statutory or common-law language, are actually the "same offense." As a result, there will always be some technical approach under which a reviewing court could hold that two offenses contain different elements. Here, Maryland courts have universally concluded that reckless endangerment and first-degree assault are the "same offense," and, as the Fourth Circuit panel held *in this case*, reckless endangerment is a lesser-included offense to first-degree assault. Nonetheless, through a technical analysis, the Fourth Circuit concluded that these two offenses are not the "same offense." This Court should thus grant a writ of certiorari to make clear that *Blockburger*'s "same offense" test must be applied consistently, so that if two offenses are the "same offense" for purposes of Successive Prosecution cases and Multiple Sentences cases, those two offenses must also be the "same offense" for Continued Prosecution purposes.

Because the beneficiary of a writ of habeas corpus granted on double jeopardy grounds cannot be retried, federal courts are appropriately wary about granting a writ on that basis. At some point, however, this type of skepticism has limits, and this Court should grant a writ of certiorari and use this case as a vehicle to make clear that the tests for "judgment of acquittal" and "same offense" cannot be used to lift a double jeopardy bar.

I. AFTER *SMITH*, A WRIT OF CERTIORARI IS APPROPRIATE TO CLARIFY THE DIFFERENCE BETWEEN JUDGMENTS OF ACQUITTAL AND OTHER SIMILAR INTRA-TRIAL RULINGS AND TO PROHIBIT RECHARACTERIZATION OF JUDGMENTS OF ACQUITTAL.

As this Court explained last term, an order is a judgment of acquittal if it "actually represent[ed] a resolution, correct or not, of some or all of the factual elements of the offense charged." *Smith*, 125 S. Ct. at 1134 (quoting *Martin Linen*, 430 U.S. at 571). Thus, in *Smith*, this Court held that, for two reasons, a particular order was in fact a judgment of acquittal. First, the order, as a matter of form, "certainly appeared to be" a judgment of acquittal, *id.*, inasmuch as: (1) the defendant had moved for a verdict of "not guilty"; (2) the trial court had heard argument on the sufficiency of the evidence and mentioned sufficiency of the evidence in its ruling; (3) the judge had noted on the motion that the motion had been granted; and (4) the docket had reflected the same. *See id.* at 1132-33. Second, this Court noted that the order was also, in substance, a judgment of acquittal because the trial court had "evaluated the [Commonwealth's] evidence and determined that it was legally insufficient to sustain a conviction." *Id.* at 1135 (quoting *Martin Linen*, 430 U.S. at 572).

In light of last term's decision in *Smith*, there can be no question that, as a matter of form, the order in this case "certainly appeared to be" a judgment of acquittal.[3] Among other things:

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3. In fact, a motion for judgment of acquittal under Md. R. 4-324 may *only* be made and granted on the basis of insufficiency of the evidence. *See Jackson v. Maryland*, 608 A.2d 782, 785 (Md. Ct. Spec. App. 1992) ("A motion for judgment of acquittal is an

(Cont'd)

- At the close of the State's case-in-chief, Mr. Manokey's attorney, Michelle Barnes, moved for judgment of acquittal on all counts, Pet. App. at 35a;

- At the close of evidence, Ms. Barnes renewed Mr. Manokey's motion for judgment of acquittal on all counts, Pet. App. at 37a;

- There was a specific discussion on the sufficiency of the evidence before the court granted the judgment of acquittal, Pet. App. at 37a-38a;

- As required under Md. Rule 4-324, the trial court entered a separate judgment on the record: "Mt. denied as t[o] Cts. 1 & 2; Mt. grtd. as to Cts. 3 & 4," *supra* at 5;

- Both the Maryland State Post-Conviction Relief Court and the District Court concluded this was a judgment of acquittal for insufficient evidence. *See* Pet. App. at 40a & 25a-26a.

Consistent with this overwhelming evidence, the State of Maryland repeatedly conceded during oral argument before the Fourth Circuit that this was a judgment of acquittal. *See supra* at 9-10. Moreover, as was the case in *Smith*, as a matter of substance, this was a judgment of acquittal because in granting the motion

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(Cont'd)
inappropriate vehicle for challenging counts on any other ground than the legal sufficiency of the evidence to support a guilty verdict." (quotation omitted)); *Borgen v. Maryland*, 468 A.2d 390, 392 (Md. Ct. Spec. App. 1983) ("The motion for judgment of acquittal seeks a court-entered judgment of acquittal on the basis of insufficient evidence.").

for judgment on reckless endangerment, the Court found the State's evidence insufficient to prove recklessness. Pet. App. at 38a.[4]

This Court should grant a writ of certiorari for two reasons. First, this Court should grant a writ of certiorari and use this case to clarify the difference between a judgment of acquittal granted mid-trial and other similar types of intra-proceeding rulings. That is, certain intra-trial rulings on evidence and jury instructions require analyses that are very similar to the analysis conducted when a court considers a motion for judgment of acquittal.[5] And, after *Smith*, it is critically important to distinguish between a judgment of acquittal and these other similar types of intra-trial rulings. This case thus presents a strong vehicle for this Court to make clear that notwithstanding the similarities between a judgment of acquittal and other intra-trial rulings, a reviewing court is not free to recharacterize a judgment of acquittal and thereby lift a double jeopardy bar.

Second, this Court should grant a writ of certiorari to clarify that reviewing courts may not simply recharacterize an intra-trial judgment of acquittal as something else in order to avoid restrictions under the Double Jeopardy Clause. Under *Smith* and *Martin Linen*, a court of appeals is required to determine what actually happened, not dictate what should have happened in the trial court; therefore, a judgment of acquittal is final and

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4. Indeed, this Court could grant a writ of certiorari and require reversal under a straightforward application of *Smith*.

5. For example, under Maryland law, a trial judge may refuse to provide an instruction on an uncharged lesser-included offense if "there exists no rational basis by which the jury could conclude that the defendant is guilty of the lesser included offense but not guilty of the greater offense." *See Jackson v. Maryland*, 586 A.2d 6, 11 (Md. 1991).

binding for double jeopardy purposes even if "based upon an egregiously erroneous foundation." *Martin Linen*, 430 U.S. at 571 (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)). Indeed, under the Fourth Circuit's analysis, the order in *Smith* similarly could have been recharacterized as a decision not to give a lesser-included offense instruction.

Because a judgment of acquittal holds such a special place in our criminal law and procedure jurisprudence, other courts of appeal have consistently refused to permit such orders to be recharacterized. Thus, the Fourth Circuit's recharacterization of the ruling here not only conflicts with this Court's holdings, but also with the holdings of a number of other courts of appeals that have rejected *post hoc* attempts to recharacterize trial court rulings into a "correct" decision. For example, in *Mannes v. Gillespie*, 967 F.2d 1310 (9th Cir. 1992), after a mistrial occurred due to a hung jury, the trial court dismissed murder charges based on insufficient evidence. According to the Ninth Circuit, the trial court mistakenly "believed retrial would be possible" after the dismissal. *Id.* at 1316. The state urged the Ninth Circuit to interpret the trial court's ruling not as a judgment of acquittal but merely as dicta accompanying the judge's declaration of a mistrial based on the hung jury. The Ninth Circuit rejected this approach, holding that "[i]n the absence of a clear indication to the contrary, we must assume that the trial judge intended [insufficiency of the evidence] to carry its accepted meaning . . . rather than that the judge entertained personal doubts about the verdict." *Id.* at 1315 (quotation omitted); *see also Wang v. Withworth*, 811 F.2d 952 (6th Cir. 1987) (rejecting attempt to recharacterize a judgment of acquittal entered based on mistaken evidentiary ruling); *Freer v. Dugger*, 935 F.2d 213 (11th Cir. 1991) (same). Reviewing courts simply cannot have unfettered discretion to call an order something it was not, and this Court should grant a writ of certiorari because the Fourth Circuit's recharacterization is contrary to *Smith* and *Martin Linen* and the rule in other courts of appeals.

II. A WRIT OF CERTIORARI IS APPROPRIATE TO CLARIFY THE "SAME OFFENSE" TEST THAT APPLIES TO THESE CASES.

"In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the [*Blockburger*] test, the double jeopardy bar applies." *United States v. Dixon*, 509 U.S. 688, 696 (1993); *see also Blockburger*, 284 U.S. at 304 (setting out the "same elements" test). This case presents the important issue of whether the "same offense" analysis is identical in Successive Prosecution, Multiple Sentences, and Continued Prosecution cases. For the reasons set forth below, this Court should grant a writ of certiorari to clarify that there is only one "same offense" analysis that applies in all Double Jeopardy cases – an important issue that has arisen in the wake of *Smith*.

Here, it is clear that the two offenses at issue – reckless endangerment and first-degree assault under Maryland law – are the "same offense" for purposes of Successive Prosecution and Multiple Sentences cases.[6] First, Maryland courts uniformly have treated reckless endangerment and first-degree assault as the "same offense" in Multiple Sentences cases. Maryland case law is replete with cases merging the two offenses.

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6. The plain language, legislative history, and statutory structure of the assault statute make clear that reckless endangerment under Maryland law is a lesser-included offense to first-degree assault under Maryland law. Indeed, first-degree assault includes the elements of second-degree assault. *Maryland v. Martin*, 785 A.2d 1270, 1272 (Md. 2001) ("By *nol prossing* this first degree assault charge . . . the State effectively *nol prossed* the lesser included offense of second degree assault which was subsumed into that charge in accordance with the statute." (quotation omitted)).

See, e.g., Benedict v. Maryland, 831 A.2d 1060, 1061 (Md. 2003) (noting merger of reckless endangerment and second-degree assault at sentencing); *Jones v. Maryland*, 745 A.2d 396, 401 (Md. 2000) (same); *Lamb v. Maryland*, 613 A.2d 402, 404 (Md. Ct. Spec. App. 1992) (same). And, in a case involving charges nearly identical to those here, the Maryland Court of Appeals noted that reckless endangerment and first-degree assault merge. *See Jackson v. Maryland*, 772 A.2d 273, 274 n.1 (Md. 2001) (noting that second-degree assault and reckless endangerment are "offenses that merge into a conviction for first degree assault."). Thus, there can be no doubt that for Multiple Sentences purposes, these two offenses are the "same offense."

Second, it is well established that for the purposes of Successive Prosecution and Multiple Sentences cases, lesser-included offenses are the "same offense" as their greater counterparts. *Rutledge v. United States*, 517 U.S. 292, 297 (1996) ("In subsequent applications of the [*Blockburger*] test, we have often concluded that two different statutes define the 'same offense,' typically because one is a lesser included offense of the other.").[7] Under Maryland

7. *See also United States v. Gaskin*, 364 F.3d 438, 453 (2d Cir. 2004) (stating that double jeopardy principles apply not only to "the same offense but also when one offense is a lesser included offense of the other." (internal quotation omitted)); *Anderson v. Mullin*, 327 F.3d 1148, 1154 (10th Cir. 2003) (finding that lesser included and greater offenses are "the same statutory offense within the meaning of the Double Jeopardy Clause." (quotation omitted)); *Palazzolo v. Gorcyca*, 244 F.3d 512, 519 (6th Cir. 2001) (acknowledging that "greater and lesser included offenses [are the] 'same offense' for double jeopardy purposes"); *United States v. Hatchett*, 245 F.3d 625, 630 (7th Cir. 2001) ("Where proof of one offense necessarily entails proof that another offense occurred, rendering the latter a lesser included offense of the former, the two offenses are deemed to be the 'same' for purposes of *Blockburger*."); (Cont'd)

law, reckless endangerment is a lesser-included offense to first-degree assault, and, as a matter of law, these two offenses would thus be the "same offense" for Successive Prosecution purposes. Indeed, the Fourth Circuit's decision in this case – which includes two separate opinions that each garnered the support of at least two members of the panel – holds that reckless endangerment is a lesser-included offense to first-degree assault: "It is clear from the record in this case that the trial court was refusing to charge the *lesser-included offense of reckless endangerment*, not issuing Manokey a judgment of acquittal." Pet. App. at 13a (emphasis added); *see also id.* ("Instead, the trial court's ruling

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(Cont'd)

Huynh v. King, 95 F.3d 1052, 1061 (11th Cir. 1996) (Double Jeopardy Clause prohibits the state from punishing a person twice for the same offense, "and a greater offense and lesser included offense are considered the same offense for purposes of Double Jeopardy Clause protection."); *Bally v. Kemna*, 65 F.3d 104, 106 (8th Cir. 1995) ("[T]he Double Jeopardy Clause prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on the lesser included offense." (quotation omitted)); *United States v. Parrilla-Tirado*, 22 F.3d 368, 372 (1st Cir. 1994) ("[I]f the crimes charged have the same elements, or if one is a lesser included offense of the other, double jeopardy at some point will bar [further prosecution]." (citation omitted)); *Taylor v. Whitley*, 933 F.2d 325, 330 n.8 (5th Cir. 1991) ("The 'same offense' as the term is used [in Double Jeopardy analysis], is (1) an offense which requires the identical elements of proof of the original offense, or (2) a greater- or lesser-included offense."); *United States v. Gomberg*, 715 F.2d 843, 851 (3d Cir. 1983) ("[T]he *Blockburger* test always deems a lesser included offense the same as the greater because by definition the greater offense includes all the elements of the lesser."); *United States v. Snell*, 592 F.2d 1083, 1085 n.2 (9th Cir. 1979) (concluding that lesser and greater offenses are the "same offense" under the *Blockburger* standard).

is best described as a refusal to give an instruction on a lesser-included offense.").[8]

Notwithstanding that these two offenses are the same offense for Successive Prosecution and Multiple Sentencing purposes, the Fourth Circuit conducted a technical analysis of Maryland jury instructions – ignoring the plain language of the statutes – and concluded that the two offenses are not the "same offense." Pet. App. at 6a-8a. The Fourth Circuit's holding, like the conclusion of the PCR court in this regard, is unreasonable under AEDPA. As a result of the Fourth Circuit's application of the "same offense" test, acquittal on a lesser-included offense now will no longer bar prosecution on the greater offense, something that has never otherwise been possible. In this context, this Court should grant a writ of certiorari to clarify the "same offense" analysis that applies in Continued Prosecution cases.

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8. The Fourth Circuit's opinions thus contain internal inconsistencies that are critical in this case. On the one hand, two members of the panel joined an opinion holding that the two offenses are not the "same offense," but on the other hand all three members of the panel agreed that reckless endangerment is a lesser-included offense to first degree assault – which by definition makes them the "same offense" under the Double Jeopardy Clause.

III. A WRIT OF CERTIORARI IS APPROPRIATE TO RESOLVE THE SPLIT AMONG THE CIRCUITS ON WHETHER A CERTIFICATE OF APPEALABILITY IS NECESSARY UNDER THESE CIRCUMSTANCES.

It is settled that an appellee generally may defend a District Court order on any grounds available without filing a cross-appeal. *See Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) ("As the prevailing party, the appellee was of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals."); *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924) ("[I]t is . . . settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."). As this Court has explained, a cross-appeal is only necessary where an appellee seeks to "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary." *Am. Ry. Express Co.*, 265 U.S. at 435. Here, Mr. Manokey received from the District Court everything he sought, and he was seeking neither to enlarge his own rights nor to lessen those of the appellant.[9] Therefore, Mr. Manokey did not need to cross-appeal to defend the District Court's judgment on the basis of ineffective assistance of counsel.

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9. Under the District Court's order, Mr. Manokey would have been released without the possibility of retrial. Thus, had the Fourth Circuit considered Mr. Manokey's ineffective assistance of counsel claim, it could not have enlarged Mr. Manokey's rights beyond those granted by the District Court.

The Fourth Circuit recognized that under the traditional rule Mr. Manokey would not have been required to notice a cross-appeal, but held that "[f]ederal habeas, however, is different" because of AEDPA's requirement of a certificate of appealability under 28 U.S.C. § 2253(c)(1). Pet. App. at 10a. The Fourth Circuit thus joined the Second and Eighth Circuits in concluding that when defending on appeal the grant of a writ of habeas corpus, a petitioner must obtain a certificate of appealability in order to raise any ground that was rejected by the District Court. *See, e.g., Jones v. Keane*, 329 F.3d 290, 296-97 (2d Cir. 2003); *Fretwell v. Norris*, 133 F.3d 621, 623 (8th Cir. 1998).

By contrast, the Third, Seventh, and Ninth Circuits apply the traditional rule that a habeas petitioner who is granted a writ of habeas corpus does not need to cross-appeal in order to defend the District Court's holding on alternative grounds. *See Ramirez v. Castro*, 365 F.3d 755, 762 (9th Cir. 2004) ("We may affirm the decision to grant a petition on any ground supported by the record, even if it differs from the rationale of the district court." (quotation and citation omitted)); *Trueblood v. Davis*, 301 F.3d 784, 786 (7th Cir. 2002) ("There was no need for the petitioner to file a cross-appeal, since he was not seeking to alter the judgment, but merely defending it on additional grounds."); *Kontakis v. Beyer*, 19 F.3d 110, 112 n.1 (3d Cir. 1994) ("[Petitioner] was not required to cross-appeal, as by raising these issues he is not seeking to enlarge his rights beyond those granted by the district court's order [granting the writ]."). Under this authority, because Mr. Manokey did not need to cross-appeal, the AEDPA requirement for a certificate of appealability did not apply. *See* 28 U.S.C. § 2253(c) (requiring a certificate of appealability only when an petitioner seeks to take an "appeal"). In other words, there appears to be a deep and mature conflict between the rulings from the Fourth, Second and Eighth Circuits on the one hand and the Third, Seventh, and Ninth Circuits on the other hand.

This Court should therefore grant a writ of certiorari to resolve this deep and mature split among the circuits.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED DECEMBER 2, 2004

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03-6932

KENNETH CHATONE MANOKEY,

Petitioner-Appellee,

v.

LLOYD L. WATERS, Warden of the Maryland Correctional Institution; J. JOSEPH CURRAN, JR., The Attorney General of the State of Maryland,

Respondents-Appellants.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Catherine C. Blake, District Judge
(CA-02-1040-CCB)

Argued: May 4, 2004

Decided: December 2, 2004

Before WILLIAMS and TRAXLER, Circuit Judges, and Pasco M. BOWMAN, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Reversed by published opinion. Senior Judge Bowman wrote the opinion, in which Judge Traxler joined. Judge Williams wrote a separate opinion, concurring in part and concurring in the judgment.

OPINION

BOWMAN, Senior Circuit Judge:

The State of Maryland appeals an order of the district court granting habeas relief on a double-jeopardy ground to Kenneth Chatone Manokey under 28 U.S.C. § 2254(d). We reverse.

In 1998, Manokey went to trial in state court on various charges relating to the stabbing of his former girlfriend, Phyllis Smith. The charges included first-degree assault, second-degree assault, wearing and carrying a dangerous weapon with intent to injure, and reckless endangerment. At the end of the trial, Manokey moved for a judgment of acquittal on all the charges. Pursuant to that motion, the trial judge dismissed the weapon count and the reckless-endangerment count, and the case was submitted to the jury on the first-degree-assault and second-degree-assault charges. The jury found Manokey guilty of first-degree assault and did not return a verdict on the second-degree-assault charge. Manokey was sentenced to a twenty-five-year prison term on the conviction for first-degree assault.

Manokey appealed, raising a single issue: whether the evidence was sufficient to support the first-degree-assault conviction. In an unreported opinion, the Maryland Court of Special Appeals rejected Manokey's claim that the evidence was insufficient and affirmed his conviction. *Manokey v. State*, No. 1465 (Md. Ct. Spec. App. Nov. 1, 1999). Manokey then pursued his post-conviction remedy (PCR), asserting several

grounds for relief and raising his double-jeopardy claim for the first time in any court.[1] The claim stands or falls on whether first-degree assault and reckless endangerment are one and the same offense for double-jeopardy purposes. If they are, the trial court's grant of the motion for judgment of acquittal on the reckless-endangerment count created a double- jeopardy bar to submitting the first-degree-assault count to the jury. The state PCR court determined that they are not one and the same offense and denied relief on the double-jeopardy claim, as well as on all of Manokey's other claims.[2] Manokey then sought appellate review of the PCR court's ruling. In an unreported per curiam opinion, the Maryland Court of Special Appeals summarily denied Manokey's application for leave to appeal the post-conviction court's denial of relief. *Manokey v. State,* No. 2934 (Md. Ct. Spec. App. Dec. 14, 2001). Within the one-year statute of limitations, *see* 28 U.S.C. § 2244(d)(1), Manokey filed his § 2254 petition, raising six grounds for habeas relief. The district court granted the writ on the double-jeopardy ground but denied relief on all the other grounds. The state's timely appeal followed. Manokey did not seek a certificate of appealability (COA) and has no appeal before us.

A federal court may not grant habeas relief under § 2254 "with respect to any claim that was adjudicated on the merits in State court proceedings" unless the state-court ruling:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

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1. The state has not argued that Manokey's failure to raise this claim at trial and in his direct appeal was a procedural default, so we consider the issue as having been waived.

2. Both at the post-conviction hearing and in the order denying post-conviction relief, the PCR court described Manokey's petition as "frivolous." *Manokey v. State,* No. 9610 (Cir. Ct. Dorchester County, Md.) Post-Conviction Hr'g Tr. at 28 (Dec. 7, 2000) and Mem. & Order at 3 (Jan. 4, 2001).

> established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The state PCR court decided the double-jeopardy claim on its merits and held that as a matter of state law, the offenses of first-degree assault and reckless endangerment are not the same. Applying *Blockburger v. United States,* 284 U.S. 299 (1932), the PCR court found that each offense required proof of an element the other offense did not, and therefore the state trial court's granting of the motion for judgment of acquittal on the reckless-endangerment charge did not raise a double-jeopardy bar to Manokey's trial and conviction on the first-degree-assault charge.

Manokey, relying on *Williams v. State,* 641 A.2d 990 (Md. Ct. Spec. App. 1994), contends the PCR court's reading of state law was clearly wrong, and hence the court's application of *Blockburger* resulted in a decision involving an unreasonable application of clearly established federal law. That is the theory on which the district court granted habeas relief. For its part, the state distinguishes *Williams* and argues that the PCR court's determination that first-degree assault and reckless endangerment each required proof of an element that the other did not was a correct statement of Maryland law.

Williams is not a double-jeopardy case. Instead, it involves an application of the common-law merger doctrine for purposes of sentencing. As in the present case, in *Williams* the charges arose from the same incident; the defendant had been convicted

of both (1) assault with intent to maim and (2) reckless endangerment, and he had been sentenced on each conviction, the sentences to run concurrently. The court, rejecting the contention that the convictions were mutually inconsistent, went on to consider the merger question. After discussing the background of the reckless-endangerment statute, with additional discussion of *actus reus, mens rea,* and related matters, the court held that for sentencing purposes the crime of reckless endangerment merged with the crime of assault with intent to maim. Having so held, the court affirmed the sentence for assault with intent to maim (ten years) and vacated the concurrent sentence for reckless endangerment (five years). *Williams* does not say, nor, as far as we know, has any Maryland state court ever said, that the granting of a judgment of acquittal on a reckless-endangerment charge results in a double jeopardy bar against trial and conviction on either an assault-with-intent-to-maim charge or a first-degree-assault charge.[3]

The *Williams* holding on merger of the two crimes for sentencing purposes thus is not controlling on the double-jeopardy issue presented by Manokey. The question is not whether first-degree assault and reckless endangerment merge as a matter of state law for sentencing purposes when both charges

3. Since *Williams* was decided in 1994, the Maryland General Assembly has repealed the statute that established the assault-with-intent-to-maim offense and has replaced it with Md.Code Ann., Crim. Law § 3-202, assault in the first degree, which is the offense of which Manokey was charged and convicted. This newly-defined offense is different in structure and language from the former assault-with-intent-to-maim offense that was before the court in *Williams,* and it quite simply prohibits intentionally causing or attempting to cause serious physical injury to another. But we make little of this because the reasoning of *Williams* still would seem applicable to a merger-for-sentencing-purposes question arising in a case in which the defendant was convicted of violating both § 3-202 and the reckless-endangerment statute.

are based on the same incident but whether the granting of a motion for a judgment of acquittal on the reckless-endangerment charge results in a double-jeopardy bar against trial and conviction on the first-degree-assault charge. Under *Blockburger,* the answer depends on whether each crime requires an element of proof the other crime does not. We believe that a proper *Blockburger* analysis of the two crimes supports the state PCR court's denial of Manokey's double-jeopardy claim.

Williams itself recognizes that, although the *mens rea* of reckless endangerment may merge with the *mens rea* of assault with intent to maim, making it appropriate to sentence the defendant only on the greater crime, each crime requires proof of a *mens rea* different from the *mens rea* of the other crime. Assault with intent to maim requires proof of a specific intent to inflict physical harm upon the person of another. Reckless endangerment, however, is a lesser charge, requiring only proof of reckless indifference to a harmful consequence. In explaining its merger-for-sentencing-purposes holding, *Williams* goes on to say that "the subjective *mens rea* of reckless indifference to a harmful consequence at a certain point along the rising continuum of blameworthiness may ripen into the even more blameworthy specific intent to inflict the harm." *Id.* at 1010. And at that point, the reasoning continues, reckless endangerment merges, for sentencing purposes, into the greater offense of assault with intent to maim. Implicit in this reasoning in the idea that when a single act is sufficient to result in convictions for both offenses, but the victim suffered only a single harm as a result of that act, then as a matter of fundamental fairness there should be only one punishment because in a real-world sense there was only one crime.[4] Though the *Williams* opinion cites *Blockburger,* it does

4. See *Holbrook v. State,* 772 A.2d 1240, 1252 (2001), where the petitioner argued that for sentencing purposes, his reckless-

(Cont'd)

not purport to do a complete *Blockburger*-type analysis of assault with intent to maim and reckless endangerment. Instead, the opinion merely compares the *mens rea* of the two offenses and does not compare other elements of the offenses that might differentiate them for double-jeopardy purposes. The holding of *Williams* is thus a far cry from a holding that the offenses are the same for double-jeopardy purposes.

The state PCR court was aware of *Williams* and did not consider it to control the double-jeopardy analysis that Manokey's claim required it to undertake. *Manokey v. State,* No. 9610 (Cir. Ct. Dorchester County, Md., Dec. 7, 2000) Post-Conviction Hr'g Tr. at 19-25, 27. Instead, the PCR court stated its conclusion that for purposes of applying the *Blockburger* test, "there are different factors to be proven, so far as, first-degree assault and reckless endangerment." *Id.* at 27. We believe that conclusion is entirely correct. Aside from the differences in the *mens rea* of the two crimes that the *Williams* court noted, reckless endangerment requires proof, inter alia, "that a reasonable person would not have engaged in that conduct," referring to " 'conduct that created a substantial risk of death or serious physical injury to another.' " *Holbrook v. State,* 772 A.2d 1240, 1247 (2001) (quoting *Jones v. State,* 745 A.2d 396, 406 (2000)); *see also* Md. Pattern Jury Instructions-Crim. 4:26A (Reckless Endangerment). Proof of that element is not required for conviction of first-degree assault. On the other hand, first-degree assault requires, among other things, proof of all the elements of second-degree assault, which in turn requires proof, inter alia, that "the contact was not consented to by" the victim, an element that was correctly included in the charge

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(Cont'd)

endangerment convictions should merge with his arson conviction as a matter of "fundamental fairness." The court declined to address this argument because it had not been preserved for appellate review.

to the jury at Manokey's trial. Md. Pattern Jury Instructions-Crim. 4:01 (Second Degree Assault). Proof of this element is required when the assault charged involves a battery, as in Manokey's stabbing of his victim, and is not required for conviction of reckless endangerment. Thus, as the state PCR court held, the Maryland offenses of reckless endangerment and first-degree assault each contain elements not required for conviction of the other.[5]

Having so held, the state PCR court applied the *Blockburger* test, found it satisfied, and concluded that Manokey's double-jeopardy claim must fail. The *Blockburger* test, simply stated, is whether each of the two offenses "requires proof of a different element." *Blockburger,* 294 U.S. at 304. If each requires proof of a different element, then " 'an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' " *Id.* at 304 (quoting *Morey v. Commonwealth,* 108 Mass. 433, 434 (1871), and noting the Court's previous adoption of this language in *Gavieres v. United States,* 220 U.S. 338, 342 (1911)). *Blockburger* is controlling authority and is the seminal case establishing the federal standard for deciding whether two separate offenses are the same. Manokey sought leave to appeal the state PCR court's denial of post-conviction relief; the Maryland Court of Special Appeals (the same court that several years earlier had issued the *Williams* decision) summarily denied Manokey's application. We believe the state PCR court's double-jeopardy ruling was based upon a correct understanding of Maryland law and was also a correct application of *Blockburger.* At the very least, we cannot say the

5. The opinion of the district court recognizes the existence of these disparate elements but fails to recognize their significance to a correct *Blockburger*-type analysis. *See Manokey v. Waters,* No. CCB-02-1040 (D.Md. May 12, 2003) Memorandum Opinion at 10-11.

state PCR court's rejection of Manokey's double-jeopardy claim either was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1).[6] Accordingly, we reverse the district court's grant of habeas relief to Manokey on his double-jeopardy claim.[7]

We turn now to a separate matter. Manokey, who is, of course, the appellee here, and who has not obtained a COA on any issue, argues that he is entitled to habeas relief on an alternative ground. He contends the district court erred in holding

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6. Factual determinations are not at issue in this appeal. Thus § 2254(d)(2) does not come into play.

7. The state, in a footnote in its brief, appears to suggest another basis for reversal: that the state trial court's dismissal of the reckless-endangerment count was not based on insufficiency of the evidence. Because the state did not develop an argument on this point, I elected not to consider the matter in this opinion. Judge Williams, however, in her concurring opinion has independently explored the matter and has concluded that double jeopardy does not attach inasmuch as the dismissal of the reckless-endangerment count was in fact not based on insufficiency of the evidence. Having studied Judge Williams's concurring opinion, Judge Traxler and I both agree with Judge Williams's conclusion that the dismissal of the reckless-endangerment count was not a judgment of acquittal for purposes of double jeopardy. Judge Traxler also concurs in my conclusion that the first-degree-assault charge and the reckless-endangerment charge are not the same for purposes of double jeopardy. (Judge Williams simply prefers not to reach the "same offense" ground.) Accordingly, my opinion and Judge Williams's concurring opinion each have captured the adherence of at least a majority of the panel; thus each opinion, each on a different ground, operates as a reversal of the district court's grant of habeas relief.

The panel unanimously agrees that the lack of a certificate of appealability precludes our consideration of Manokey's ineffective-assistance claim.

that a procedural default precluded habeas review of Manokey's claim of ineffective assistance of counsel. Ordinarily, an appellee may defend a judgment on any ground that was raised in the lower court. Federal habeas, however, is different. In a federal habeas proceeding, no claim with respect to which the district court denied relief may be appealed to the court of appeals unless the petitioner obtains a COA. *See* 28 U.S.C. § 2253(c)(1). A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requirement extends to claims that the district court has rejected on grounds of procedural default. *See Slack v. McDaniel,* 529 U.S. 473, 484 (2000) (holding that "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling").

We are unaware of any decision from this circuit that addresses the question of whether a COA is required when a habeas petitioner, as appellee, seeks appellate review of a rejected claim, but the Second Circuit and the Eighth Circuit have answered this question in the affirmative. *See Jones v. Keane,* 329 F.3d 290, 296-97 (2d Cir.) (holding that habeas petitioner who is appellee, with state appealing district court's grant of habeas relief on one or more grounds, may not seek habeas relief on alternative grounds rejected by district court without obtaining a COA specifying those grounds) (citing *Grotto v. Herbert,* 316 F.3d 198, 209 (2d Cir.2003) ("[W]e conclude that a habeas petitioner to whom the writ has been granted on one or more grounds may not assert, in opposition to an appeal by the state, any ground that the district court has not adopted unless the petitioner obtains a certificate of appealability permitting

him to argue that ground.")), *cert. denied* 124 S.Ct. 804 (2003); *Fretwell v. Norris,* 133 F.3d 621, 623 (8th Cir.) (dismissing habeas petitioner's cross appeal where COA had been denied), *cert. denied,* 525 U.S. 846 (1998). *But see Ramirez v. Castro,* 365 F.3d 755, 762 (9th Cir.2004) (stating, where habeas petitioner was appellee without a COA, and with no discussion of COA requirement, that "[w]e may affirm the decision to grant a petition 'on any ground supported by the record, even if it differs from the rationale of the district court' ") (citations omitted). We agree with the Second and the Eighth Circuits, and we hold that Manokey's appellate arguments concerning his ineffective-assistance claim cannot be reached in the absence of a COA. In addition, even if we were to consider his appellee's brief as a request for a COA, we would deny the request because he has failed to make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), with respect to the rejected ineffective-assistance claim. Indeed, Manokey's brief is devoid of any argument whatsoever that would bear on the merits-of-the-claim portion of the *Slack* test for issuance of a COA on a claim, such as this one, that the district court has denied on procedural grounds. *See Slack,* 529 U.S. at 484.

For the reasons stated, we reverse the order of the district court insofar as it grants habeas relief and remand with instructions to dismiss Manokey's petition.

Appendix A

WILLIAMS, Circuit Judge, concurring in part and concurring in the judgment:

I concur fully in the portion of the majority opinion holding that habeas petitioners must obtain a certificate of appealability to raise alternate grounds for affirming a district court's grant of a habeas writ, and in the majority's judgment that the district court erred in granting a writ of habeas corpus to Manokey in this case. I write separately, however, because I do not believe we must resolve the close question of whether reckless endangerment and first degree assault are the "same offense" within the meaning of *Blockburger v. United States*, 284 U.S. 299 (1932). Even assuming reckless endangerment is a lesser-included offense of first degree assault, I would reverse the grant of habeas relief to Manokey because the trial court did not actually acquit Manokey of reckless endangerment, and, accordingly, Manokey was not "twice put in jeopardy of life or limb." U.S. Const. amend. V. *See* 28 U.S.C.A. § 2254(a) (permitting a circuit judge to grant a writ of habeas corpus only on the ground that a petitioner is "in custody in violation of the Constitution or laws or treaties of the United States").

A trial court's ruling constitutes a judgment of acquittal for purposes of double jeopardy "only when it is plain that the [trial court] . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." *United States v. Scott*, 437 U.S. 82, 97 (1978) (internal quotation marks omitted). A reviewing court must independently determine "whether the [trial court's] ruling . . . actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply*, 430 U.S. 564, 571 (1977). In other words, "what constitutes a judgment of acquittal may not be determined simply by the form

or caption of the court's order." *United States v. Alvarez*, 351 F.3d 126, 129 (4th Cir.2003).[1]

It is clear from the record in this case that the trial court was refusing to charge the lesser-included offense of reckless endangerment, not issuing Manokey a judgment of acquittal. At the close of the state's case, Manokey moved for acquittal on the reckless endangerment charge, arguing that the state had failed to show a substantial risk of death or serious injury. (J.A. at 187.) As defense counsel explained, "[t]his is not like a stab wound to the heart or in the lung." (J.A. at 187.) Manokey renewed this motion at the close of his case. (J.A. at 209.) The trial court, after reiterating that a conviction for reckless endangerment required the state to prove Manokey engaged in conduct that created a substantial risk of harm and that he acted recklessly in doing so, concluded, "I feel that there is evidence that would support a finding that what he did would have been intentional. I'll grant your motion as to reckless endangerment." (J.A. at 209.) Although the trial court purported to grant a motion of acquittal, its analysis does not meet the dictates of *Martin Linen* and *Scott*. Instead, the trial court's ruling is best described as a refusal to give an instruction on a lesser-included offense.

Under Maryland law, a trial court is required to give an instruction on a lesser-included offense charged in the indictment only "so long as it was a permissible verdict generated by the evidence." *Dishman v. State*, 721 A.2d 699, 705 (1998). Thus,

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1. For instance, in *Alvarez*, following a mistrial, the district court granted the defense's motion for judgment of acquittal, explaining "there is little likelihood that any jury will ever convict either of the defendants on the charges." *United States v. Alvarez*, 351 F.3d 126, 129 (4th Cir.2003). We held that this order was not a judgment of acquittal for double jeopardy purposes because the district court "never expressly addressed the sufficiency of the [government's] evidence." *Id.* at 130.

"a defendant is not entitled to a lesser-included offense instruction unless the evidence adduced at the trial provides a rational basis upon which the jury could find him not guilty of the greater offense but guilty of the lesser offense." *Id.* (quoting *United States v. Elk*, 658 F.2d 644, 648 (8th Cir.1981)). The record makes clear that the trial court's ruling, right or wrong, was a finding that, because the state had entered evidence that Manokey acted intentionally and Manokey had presented no evidence to the contrary, no jury could find Manokey not guilty of first degree assault but guilty of reckless endangerment.[2]

Accordingly, because the trial court's ruling does not constitute a judgment of acquittal on the reckless endangerment count, the limitations imposed by the Double Jeopardy Clause are not implicated in this case and Manokey cannot show that he is entitled to habeas relief under § 2254(a).

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2. Such a reading of the trial court's ruling is buttressed by the trial court's failure to address Manokey's sufficiency of the evidence argument that stabbing an individual all the way through the arm with a butter knife does not create a substantial risk of death or serious injury.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DATED MAY 12, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. CCB-02-1040

KENNETH CHATONE MANOKEY, #278 258

Petitioner,

v.

LLOYD L. WATERS, WARDEN, *et al.*,

Respondents.

MEMORANDUM OPINION

I. Introduction

Petitioner, Kenneth Manokey, filed this application for habeas corpus relief pursuant to 28 U.S.C. § 2254 on March 28, 2002. Pending before the court is Manokey's application for habeas relief (Paper No. 1), Respondents' answer thereto (Paper No. 10), and Petitioner's reply. (Paper No. 17.) After review of these pleadings, the court finds that the petition for habeas relief shall be granted because the double jeopardy clause barred Manokey's continued prosecution for first degree assault following his acquittal on the lesser included offense of reckless endangerment.

Appendix B

II. Statement of Facts[1]

On November 7, 1997, Manokey was at the home of Phyllis Smith ("Smith"). Manokey arrived at Smith's house that morning around 9:00 a.m. Curtis Freeman ("Freeman"), a friend of Smith's, came by later that day in case he could assist Smith who was recuperating from a leg operation. That evening, the trio was joined by Walter Washington ("Washington"). Smith, Freeman, and Washington played cards and drank beer while Manokey watched television in another room. Freeman left Smith's house around midnight. At some point thereafter, Manokey asked Smith to marry him.[2] She declined the offer and asked him to leave. When Manokey refused, Smith informed him that she was going to call the police, whereupon Manokey informed her she would not make it to the door to call the police and that he would kill both her and Washington. Washington then left the residence at Smith's request. By approximately 1:00 a.m. Smith was alone in the house with Manokey. She began to play solitaire in the kitchen. Manokey sat beside her and told her he cared for her. Smith advised Manokey she did not care for him at which time he grabbed a knife from near the sink. Manokey grabbed Smith's arm and stabbed it with the knife. According to Smith, the knife went through her arm. She then "hopped" from her house to a neighbor's residence to request help. (Paper No. 10 Ex. 3 at 66-74; Ex. 7 at 1-2.)

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1. The information contained in the Statement of Facts is gleaned from both the transcript of Petitioner's trial 'nd the decision of the Maryland Court of Special Appeals.

2. Smith had known Manokey for about nine years. They had previously been romantically involved but had broken up in 1996. Smith then began seeing Freeman. (Paper No. 10 Ex. 3 at 56-83; Ex. 7 at 1-2.)

Both Freeman and Washington testified. Freeman, who was dating Smith at the time of the incident, testified that all of them drank beer that day and he had smoked crack. He testified that he left Smith's house because Manokey was waiting for him to leave. (Paper No. 10 Ex. 3 at 143-151; Ex. 7. at 2-3.) Washington testified that after Freeman left, Manokey threatened him and Smith with bodily harm. He left at Smith's request in light of Manokey's threats. (Paper No. 10 Ex. 3 at 151-160, Ex. 7 at 3.)

Manokey testified in his own defense. He stated that Smith and Freeman smoked crack throughout the day, and he denied stabbing Smith or asking her to marry him. He testified that Washington was still at Smith's house when he left the premises. (Paper No. 10 Ex. 3 at 174-88; Ex. 7 at 3.)

III. Procedural History

Following a jury trial in the Circuit Court for Dorchester County, Maryland on July 8, 1998, Manokey was convicted of first degree assault.[3] (Paper No. 10 Ex. 3 at 220.) He was sentenced on September 24, 1998 to a twenty-five year term of imprisonment with the last five years suspended. (Paper No. 10 Ex. 4 at 7-8.) On appeal, Manokey's conviction and sentence were affirmed by the Maryland Court of Special Appeals in an unreported opinion filed November 1, 1999. (Paper 10 Ex. 7.) He did not seek further review of his conviction and sentence.

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3. Manokey was originally charged with first degree assault, second degree assault, wearing and carrying a dangerous weapon, and reckless endangerment. After presentation of all the evidence, the trial court granted the defense's request for judgment of acquittal on the charges of wearing and carrying a dangerous weapon and reckless endangerment. (Paper No. 10 Ex. 1 at 2; Ex. 3 at 189-91.)

He submitted a pro se post-conviction petition on May 30, 2000. (Paper No. 10 Ex. 8.) He supplemented the petition on August 16, 2000. (Paper No. 10 Ex. 9.) Following a hearing on December 7, 2000, the petition was denied by the state court judge on January 4, 2001. (Paper No. 10 Ex. 11.) The Court of Special Appeals declined review of Manokey's February 5, 2001 application for leave to appeal and issued its mandate on January 14, 2002. (Paper No. 10 Ex. 13.) Manokey filed a petition for certiorari review on January 7, 2002 which was denied by the Court of Appeals on March 8, 2002. (Paper No. 10 Ex. 14; 15.)

In the instant federal habeas application, Manokey presents the following issues:

1. the trial court's instructions to the jury suggested that the State did not have to prove intent;

2. he was denied effective assistance of counsel at trial and on direct appeal;

3. prosecutorial misconduct;

4. he was subjected to double jeopardy when he was convicted of first degree assault after being acquitted of the lesser included offense of reckless endangerment;

5. the State withheld favorable evidence including reference to constitutional rights to confrontation; and

6. he was acquitted on the charges of reckless endangerment and possession of a deadly weapon with intent to injure and the jury did not return a verdict on the charge of second degree assault because the trial court instructed them not to do so in response to the jury's question on this issue. Manokey appears to argue that the evidence did not

support a conviction for first degree assault because he was acquitted of the reckless endangerment and weapons charges.

As explained below, five of the issues are without merit, but relief must be granted on Manokey's double jeopardy claim.

IV. Discussion

A. Exhaustion of State Remedies

Under *Rose v. Lundy*, 455 U.S. 509, 510 (1982), before a petitioner may seek habeas relief in federal court, he must exhaust each claim presented to the federal court by pursuing remedies available in state court. This exhaustion requirement is satisfied by seeking review of the claim in the highest state court with jurisdiction to consider the claim. *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999); 28 U.S.C. § 2254(b) and (c). In Maryland, this may be accomplished by raising certain claims on direct appeal and by way of post-conviction proceedings.[4] Exhaustion is not required if at the time a

4. To exhaust a claim on direct appeal in non-capital cases, it must be raised in an appeal, if one is permitted. to the Maryland Court of Special Appeals and then to the Maryland Court of Appeals by way of a petition for writ of certiorari. See Md. Code Ann. Cts. & Jud. Pro. §§ 12-201, 12-301.

If an appeal of right is not permitted, as in cases where a guilty plea is entered, exhaustion can be accomplished by filing an application for leave to appeal to the Court of Special Appeals. Md. Code Ann. Cts. & Jud. Pro. § 12-302(e). If the Court of Special Appeals denies the application, there is no further review available and the claim is exhausted. Md. Code Ann. Cts. & Ind. Proc. § 12-202. However, if the application is granted but relief on the merits of the

(Cont'd)

federal habeas corpus petition is filed the petitioner has no available state remedy. *Teague v. Lane*, 489 U.S. 288, 297-98 (1989): *Bassette v. Thompson*, 915 F.2d 932, 937 (4th Cir. 1990).

Manokey is limited by statute to filing one state post-conviction petition per trial. Having once used this procedure, he has no available state remedies remaining.[5] Because he no longer has any state direct review or collateral review remedies available to him with respect to the claims raised in this court, his claims will be considered exhausted for the purposes of federal habeas review.

B. Procedural Default

Where a petitioner has failed to present a claim to the highest state court with jurisdiction to hear it, whether it be

(Cont'd)

claim is denied, the petitioner must file a petition for writ of certiorari to the Court of Appeals. *Williams v. State*, 438 A.2d 1301, 1305 (1981).

To exhaust a claim through post conviction proceedings, it must be raised in a petition filed in the Circuit Court and in an application for leave to appeal to the Court of Special Appeals. Md. Code Ann. Cts. & Jud. Pro. §§ 7-102(a), 7-109. If the Court of Special Appeals denies the application. there is no further review available and the claim is exhausted. Md. Code Ann. Crim. Pro. § 7-109(b)(4). However, if the application is granted but relief on the merits of the claim is denied, the petitioner must file a petition for writ of certiorari to the Court of Appeals. *Williams*, 438 A.2d at 1305.

5. Atthough Md. Code Ann. Crim. Pro. § 7-104 allows a defendant to seek to reopen a previously concluded post conviction proceeding, such a request would not satisfy the exhaustion requirement. *Johnson v. Smith*, 981 F. Supp. 944, 948 (D. Md. 1997).

by failing to raise the claim in post conviction proceedings or on direct appeal or by failing to timely note an appeal, the procedural default doctrine applies. *Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991) (failure to note timely appeal); *Murray v. Carrier*, 477 U.S. 478 (1986) (failure to raise claim on direct appeal); *Murch v. Mottram*, 409 U.S. 41, 46 (1972) (failure to raise claim during post-conviction); *Bradley v. Davis*, 551 F. Supp. 479, 482 (D. Md. 1982) (failure to seek leave to appeal denial of post conviction relief). A procedural default also may occur where a state court declines "to consider the [] merits [of a claim] on the basis of an adequate and independent state procedural rule." *Yeatts v. Angelone*, 166 F.3d 255, 260 (4th Cir. 1999).

Respondents argue that Manokey's allegations that he was denied effective assistance of trial and appellate counsel and the evidence was insufficient to sustain his conviction are procedurally defaulted. Specifically, Respondents maintain that Manokey's ineffectiveness claims were not raised on appeal of his post-conviction petition and that his sufficiency of the evidence claim was not presented to the highest state court with jurisdiction to consider the claim. (Paper No. 10 at 21, 26.) The procedural default doctrine bars consideration of a claim in a petition for habeas corpus absent a showing of cause and prejudice or actual innocence. *Murray*, 477 U.S. at 495. Even where a petitioner fails to show cause and prejudice for a procedural default, a court must still consider whether it should reach the merits of the petitioner's claims in order to prevent a fundamental miscarriage of justice. *See Schlup v. Delo*, 513 U.S. 298, 314 (1995). The miscarriage of justice standard is directly linked to innocence. *Id.* at 321. Innocence is not an independent claim; rather, it is the "gateway" through which a petitioner must pass before a court may consider constitutional claims which are defaulted. *Herrera v. Collins*, 506 U.S. 390, 404

(1993). The miscarriage of justice exception applies where a petitioner shows that "a constitutional violation has probably resulted in the conviction of one who is actually innocent. . . ." *Murray*, 477 U.S. at 496.

The court has reviewed Manokey's reply to Respondents' answer and finds that he has not established cause necessary to excuse his default. (Paper No. 17.) Furthermore, because Manokey has failed to come forth with any facts tending to demonstrate that the trial court's alleged shortcomings resulted in the conviction of one who is actually innocent, the court declines to reach the merits of the defaulted claims.[6]

C. Standard of Review

To prevail on his § 2254 claims, Manokey must show that a decision by the Maryland state courts "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in the light of the evidence

6. It appears, nevertheless, that the state courts' determinations on Manokey's defaulted claims were correct, *see* Paper No. 10 Ex. 7 at 3-7; Ex. 11 at 3, and that such claims do not provide a basis for habeas corpus relief. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984) (holding that the petitioner has the burden of demonstrating that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.") and *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (holding that the standard for assessing the sufficiency of the evidence claim is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.") (emphasis in original). *See also* 28 U.S.C. § 2254(e)(1) (state court determinations of factual issues are presumptively correct).

presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) & (2);[7] *see Williams v. Taylor*, 529 U.S. 362, 412-13 (2000).

D. Improper Jury Instructions

Manokey alleges that the trial court's instructions to the jury suggested that the State was not required to prove intent. He bases this argument on the trial court's statement to the jury that intent is a state of mind which cannot be proven directly because there is no way to look into a person's mind.

The post-conviction court denied relief concluding that the jury instructions given to the jury were proper and given pursuant to the Maryland Pattern Jury Instructions. (Paper No. 10 Ex. 11 at 1-2.) The court's review of the record reflects that nothing in the judge's instructions to the jury was

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7. Effective April 24, 1996 the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") amended 28 U.S.C. § 2254(d) to provide that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

improper. (Paper No. 10 Ex. 3 at 192-99.) Based on the instructions as a whole, in which the trial court instructed the jury on the presumption of innocence and the burden of proof which remained on the prosecution, the post-conviction court's determination on this issue was not an unreasonable application of federal law. *See Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973) (challenged jury instruction must be viewed in context of overall charge and not in isolation); *see also Boyde v. California*, 494 U.S. 370, 381 (1990) ("Differences among [jurors] in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.").

E. Prosecutorial Misconduct

Manokey argues that the prosecutor made improper comments during closing argument when he made reference to the victim's fingerprints being found on the knife. In support of this allegation, Manokey maintains that after the trial court granted defense counsel's motion for judgment of acquittal on the charge of wearing and/or carrying a dangerous weapon, the State should not have been allowed to refer to evidence of the weapon in its closing argument.

The post-conviction court determined that the weapon had relevance to the assault charge and found no error. (Paper No. 10 Ex. 10 at 14-15.) The record reflects that at trial, a fingerprint examiner testified that no prints had been found on the knife other than the victim's to whom the knife belonged. (Paper No. 10 Ex. 3 at 139-42.) Because the expert had testified to this, there was a factual basis for the closing argument, and it was relevant to the assault charges,

regardless of the fact that Manokey's motion for judgment was granted on the weapons charge. *See Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986).

F. Prosecution's Withholding of Evidence

Manokey alleges that the State withheld the medical report of Smith's trip to the emergency room. He further complains that no doctor was called to testify and no medical reports were introduced as evidence. Manokey fails, however, to state how the introduction of such testimony and/or records would have been beneficial to his case. Moreover, the record of his trial reflects that the State attempted to introduce a medical report made in regard to the injuries Smith sustained from being stabbed. (Paper No. 10 Ex. 3 at 95-107, 127-139.) Defense counsel objected to introduction of the report because she had concerns about its accuracy. (Paper No. 10 Ex. 3 at 74-76, 136-37.) The trial court sustained the objection. (Paper No. 10 Ex. 3 at 106, 138-39.) Additionally, a physician whom the State had subpoenaed to testify at Manokey's trial was out of the country on the day of the scheduled trial. (Paper No. 10 Ex. 3 at 2.) Defense counsel objected to any continuance in light of the fact that the doctor had been served with a subpoena in May for the July 8, 1998 trial date and she had only received notice of his inability to attend the trial in the late afternoon of July 7, 1998. (Paper No. 10 Ex. 3 at 2-3.) There being no basis for habeas relief with respect to this claim, it shall be dismissed.

G. Double Jeopardy Claim

Manokey complains that he was subjected to double jeopardy because he was acquitted of the offense of reckless endangerment which he asserts is a lesser included offense of first degree assault. As noted, at the close of all the

evidence, the trial court granted defense counsel's motion for judgment on the charges against Manokey for wearing and/or carrying a dangerous weapon and for reckless endangerment. (Paper No. 10 Ex. 3 at 191.) Manokey maintains that because he was already tried for reckless endangerment, and the charges were dismissed after the evidence was presented at trial, double jeopardy bars his conviction for first degree assault.

The Supreme Court has held that where "two offenses for which the defendant is punished or tried cannot survive the 'same-elements' test, the double jeopardy bar applies. The same elements test . . . inquires whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution." *United States v. Dixon*, 509 U.S. 688, 696 (1993); *Sanabria v. United States*, 437 U.S. 54 (1978); *Whittlesey v. Conroy*, 301 F.3d 213, 217 (4th Cir. 2002). Maryland applies the "required evidence" or "same evidence" test in determining whether two offenses are the same for double jeopardy purposes. *Holbrook v. State*, 772 A.2d 1240, 1249 (Md. 2001).

Here, Manokey alleges that double jeopardy bars prosecution for first degree assault following an acquittal for reckless endangerment, because every element of reckless endangerment is an element of first degree assault. *Dixon*, 509 U.S. at 696. Reckless endangerment is defined as "recklessly engag[ing] in conduct that creates a substantial risk of death or serious injury to another." Md. Code Ann. Crim. Law § 3-204. The elements of reckless endangerment are: "(1) that the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another; (2) that a reasonable person would not have engaged in that conduct; and (3) that the defendant acted recklessly." *Holbrook*, 772 A.2d at 1247 (internal quotation omitted).

Appendix B

First degree assault is defined as "intentionally caus[ing] or attempt[ing] to cause serious physical injury to another." Md. Code Ann. Crim. Law § 3-202. The instructions provided at Manokey's trial informed the jury that to convict Manokey of first degree assault, the State must prove that: (1) the defendant caused offensive physical contact with or physical harm to the victim; (2) the conduct was the result of an intentional or reckless act of the defendant and was not accidental; (3) the contact was not consented to by the victim; and (4) the defendant caused serious physical injury in the commission of the assault. (Paper No. 10 Ex. 3, pgs. 198-99.)

Any act which would satisfy the actus reus of first degree assault would also satisfy the actus reus of reckless endangerment, because any act which causes offensive physical contact and results in serious physical injury, and thus satisfies the actus reus of first degree assault- would be an act which creates a substantial risk of serious physical injury, and would satisfy the actus reus of reckless endangerment. Further, the law in Maryland is clear that the mens rea of reckless endangerment is subsumed in the mens rea of assault. *Williams v. State*, 641 A.2d 990, 993-94, 1010-1011 (Md. App. 1994).[8]

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8. The Maryland Court of Appeals decision in *Holbrook* is not to the contrary. *Holbrook* held that reckless endangerment does not merge with arson because arson requires the specific intent to burn a dwelling, regardless of whether a person is present in the building, while reckless endangerment requires a risk of harm to a person. *Holbrook*, 772 A.2d at 1250-51. Thus, when a person burns an unoccupied dwelling, she commits arson, but not reckless endangerment. *Id.* at 1250. For that reason, *Holbrook* does not support the proposition that the intent required for reckless endangerment is not subsumed within the intent required for a specific intent crime against a person.

Similarly, that reckless endangerment merges into first degree assault indicates that they are the "same offense" for the purposes of successive prosecution. Two offenses merge where multiple punishments for the two offenses would violate the double jeopardy clause. The "same offense" test for merger also applies to the question of successive prosecutions, *Brown v. Ohio*, 432 U.S. 161, 166 (1977) ("If two offenses are the same [under the "same offense" test] for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions."). Thus, if two offenses merge, they are the "same offense" for the successive prosecution prohibition of the Double Jeopardy clause.

The Court of Special Appeals has held that reckless endangerment merges with the prior statutory crime of assault with intent to maim, because where a person acts with an intent to harm, the person is also acting with reckless disregard of the harm. *Williams*, 641 A.2d at 993-94, 1010-1011. Since *Williams* was decided in 1994, the Maryland General Assembly repealed the prior statutory framework dealing with assault, and passed a new framework, under which Manokey was sentenced. *See generally Robinson v. State*, 728 A.2d 698, 694 (Md. 1999). The prior statutory crime of assault with intent to maim was defined as simple assault with an additional intent to maim, disfigure or disable. *Dillsworth v. State*, 519 A.2d 1269, 1272 (Md. 1987). Thus, the only element in assault with intent to maim which is not contained within first degree assault is the intent to maim. Md. Code Ann. Crim. Law § 3-202 (2002). Since the intent to maim is not an element of reckless endangerment, *see Williams*, 641 A.2d at 992, reckless endangerment merges into first degree assault under *Williams*.

This conclusion is reinforced by three other considerations. First, even if *Williams* is distinguishable because assault with intent to maim is not the same offense as first degree assault, *Williams* holds that in Maryland reckless endangerment merges with any assault.

> "To be guilty of reckless endangerment, the defendant must be shown to have possessed *nothing less than* a reckless disregard of the consequences of his life-threatening act. He may, however, be shown to have possessed a more blameworthy *mens rea*, such as intent to maim, but that excess culpability will simply be surplusage as far as the reckless endangerment charge is concerned. It certainly does not operate to exculpate him of the reckless endangerment."

Williams, 641 A.2d at 994.

Second, in *Williams*, the court cited with approval the Superior Court of Pennsylvania's holding in *Commonwealth v. Sanders*, 489 A.2d 207, 211-212 (Pa. Sup. 1985) that "the crime of recklessly endangering the victim [i]s merely a part of the crime of aggravated assault." *Williams*, 641 A.2d at 1010-11. Aggravated assault in Pennsylvania differs from first degree assault in Maryland only in that it does not require the person intentionally act, but may be satisfied where one acts "knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." Pa. Cons. Stat. § 2702(a)(1) (2003) *compare with* Md. Code Ann. Crim. Law § 3202(a)(1).

Finally, Maryland courts frequently merge reckless endangerment into assault. *E.g., Jackson v. State*, 772 A.2d 273, 274 n. 1 (Md. 2001) (noting that the intermediate

appellate court held that the trial court at sentencing erred by not merging reckless endangerment and second degree assault into first degree assault): *Jones v. State*, 745 A.2d 396, 401 (Md. 2000) (noting that the trial court merged four counts of reckless endangerment into second degree assault at sentencing); *Graham v. State*, 699 A.2d 1204, 1205 (Md. App. 1997) (noting that the trial court merged a reckless endangerment conviction into assault); *Williams v. State*, 699 A.2d 473, 474 (Md. App. 1997) (noting that the trial court merged reckless endangerment into assault with intent to maim).

In Manokey's state post-conviction proceeding, his double jeopardy argument was rejected because the state court determined that "there's a different factor to be proven in reckless endangerment, that there are different factors to be proven, so far as, first degree assault and reckless endangerment." (Paper 10 Ex. 11 at 2.) The court did not elaborate on what the different factor in reckless endangerment might be.[9] As the discussion above indicates,

9. Respondents assert that "[t]he state [post-conviction] court's ruling, that the granting of a motion for judgment of acquittal on the reckless endangerment count did not preclude submission of the assault count to the jury, is an accurate statement of state law." (Paper No. 10 at 24) (citing *Wright v. State*, 515 A.2d 1157, 1169-70 (Md. 1986)) Respondents cite *Wright* for the proposition that an "acquittal on one count would not in all cases preclude continuation of the trial on another count charging what is deemed the same offense." (Paper No. 10 at 24.) While this is an accurate statement of the holding of *Wright*, it fails to note that in some cases an acquittal does preclude a continuation of the trial on another count charging what is deemed the same offense. Indeed, *Wright* specifically holds that one of the instances where an acquittal bars a subsequent prosecution on the same offense is where there is "an acquittal by the court based on insufficiency of evidence." *Wright* at 1169, which is the situation Manokey faced. Thus, as to this case, the state post-conviction court did not accurately state the law.

the state post-conviction court's conclusion was wrong. Reckless endangerment merges into first degree assault, and therefore Manokey's double jeopardy rights were violated.

This court can only grant relief to Manokey if it finds that the state court's determination that double jeopardy does not bar his prosecution is an "unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). *See also Allen v. Lee*, 319 F.3d 645, 648 (4th Cir. 2003). The Supreme Court has elaborated on this standard, explaining that "an unreasonable application of federal law is different from an *incorrect* or *erroneous* application of federal law." *Williams v. Taylor*, 529 U.S. 362, 410 (2000) (emphasis in original). "Unreasonable application," however, means something less than "so far off the mark as to suggest judicial incompetence." *Aparicio v. Artuz*, 269 F.3d 78, 95 (2d Cir. 2001) *quoting Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000) *quoting in turn Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 889 (3d Cir. 1999) (en banc).

In this case, the state court's determination that Manokey's double jeopardy rights were not violated is an unreasonable application of federal law. It appears that the state court applied the correct test, the "same offense" test, to determine if Manokey's double jeopardy rights were violated. However, as the discussion above indicates, reckless endangerment is a lesser included offense of first degree assault. Further, this is not a close question, nor a situation where a state court was taking a plausible, yet ultimately mistaken view of the relevant law. The state court's position was simply not arguable in light of settled Maryland law explaining the elements and merger of the two offenses, and therefore it was contrary to established Supreme Court law, as set forth in *Dixon*. *See also Brown*, 432 U.S. at 165. While

it is understandable to err, in this case, because of the clarity with which the Maryland courts have spoken, the state court's error was unreasonable.

Accordingly, Manokey's habeas application shall be granted on his double jeopardy claim.

IV. Conclusion

In light of the foregoing, the Petition for Writ of Habeas Corpus will be GRANTED and the case will be remanded to the state court for further proceedings consistent with this opinion.

A separate Order follows.

Dated: May 12, 2003

s/ Catherine C. Blake
CATHERINE C. BLAKE
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING FILED DECEMBER 29, 2004

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-6932
CA-02-1040-CCB

KENNETH CHATONE MANOKEY

Petitioner - Appellee

v.

LLOYD L. WATERS, Warden of the Maryland Correctional Institution; J. JOSEPH CURRAN, JR., The Attorney General of the State of Maryland

Respondents - Appellants

On Petition for Rehearing and Rehearing En Banc

The appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Appendix C

Entered at the direction of Judge Williams, with the concurrence of Judge Traxler and Judge Bowman.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX D — EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS DATED MARCH 5, 1998 AND JULY 8, 1998

IN THE CIRCUIT COURT OF THE STATE OF MARYLAND IN AND FOR THE COUNTY OF DORCHESTER

NO. 9610

STATE OF MARYLAND

VS.

KENNETH MANKOY

[Commencing at page 167]

* * *

Ms. Barnes: I make a motion for judgement at this time.

The Court: Do you wish to be heard.

Ms. Barnes: Yes, Your Honor.

Specifically regarding the first degree assault. First degree assault requires a find of [168] serious physical injury that creates a substantial risk of death, serious, permanent or serious protracted disfigurement. Serious permanent or serious protracted. Also of a function of a bodily member or organ. Or serious permanent or protractive impairment of function.

There is absolutely nothing testified to regarding the injury otherthan there was a stab in the arm. There has been nothing testified to regarding the condition of Ms. Smith,

even at that time. Or the condition or extent of the jury to date what the prognosis was. There has been no medical evidence admitted, no doctor who was called to testify, even Ms. Smith, has testified herself has not testified to her condition other than the fact that she was stabbed which in of itself does not arise to the level of first degree assault.

The state has provided not a single bit of evidence regarding serious physical injury in this case. The best state has provided is second degree assault. I would make a same argument regarding the reckless endangerment count, there has been nothing indicating that there was reckless endangerment or that there has been a [169] substantial risk of death or serious bodily injury. This is not like a stab wound to the heart or in the lung or in some location where the court can infer or allow it to get beyond that point. Or beyond this point. At any rate, this is something that were talking about being in the forearm certainly it would not raise to the level of assumptions of the degree of harm. We have know idea what the degree of harm is here.

So, specifically with those arguments I would move for a motion for judgment.

Mr. Maloney: Your Honor, under the statute were certainly relying under Article 27, Section 12. Which deals with number two, there under the serious physical injury it says causes serious permanent or serious protracted disfigurement. Your Honor, the disfigurement when the young lady got up and went to the jury they could clearly see her arm. The scar that she has and its quite evident it's a disfigurement. All right the only definition of serious physical injury this could possibly come under was serious and, the jury has seen the scarring. And it appears it would be for them to determine serious and protracted [170] disfigurement.

What I'm going to do is deny the motion in all counts at this time and if there is further support for your argument, Ms. Barns, I'll consider it at the end of your case. Okay.

* * *

[189] Ms. Barnes: I renew my motion for judgement at this time.

The Court: As to all counts?

Ms. Barnes: Yes, Your Honor.

The Court: All right. Do you wish to be heard?

Ms. Barnes: No Your Honor.

The Court: Mr. Maloney.

Mr. Maloney: I have nothing further to say. I believe that everything should go to the jury.

The Court: I think there is ample evidence for a jury to consider as trier of fact.

Counsel, I'm looking at the first Count Three. I'll deny the motion as to Count 1 and Two because cause I do feel its up to the jury to determine whether or not based on the evidence they observed whether or not this was a serious protractive disfigurement to the body of Ms. [190] Smith.

Now, as far as Count Three, wearing and carrying a dangerous weapon.

Mr. Maloney: The wearing and caring would be the time that they grabbed it out of the kitchen and all though it's a butter knife and that he uses it, it becomes a deadly weapon.

The Court: Ms. Smith testified that he grabbed it out of the kitchen and immediately stabbed her in the arm.

* * *

[191] The Court: Grants the motion.

Ms. Barnes: Did the Court make a ruling on the reckless endangerment, Your Honor.

The Court: Again I argument that the State has to show that there is a substantial risk of –

The Court: Serious physical injury.

Ms. Barnes: Which does not include protractive disfigurement. Does not include reckless endangerment.

The Court also that, he acted recklessly. I feel that there is evidence that would support a finding that what he did would have been intentional. I'll grant your motion as to reckless endangerment. Okay.

Would you bring the jury in please.

* * * *

APPENDIX E — MEMORANDUM AND ORDER OF THE CIRCUIT COURT FOR DORCHESTER COUNTY, MARYLAND DATED JANUARY 4, 2001

IN THE CIRCUIT COURT FOR DORCHESTER COUNTY, MARYLAND

CASE NO. K97-009610

KENNETH C. MANOKEY

v.

THE STATE OF MARYLAND

MEMORANDUM AND ORDER

The Court: All right, sir. Well, now, I'm going to deny the petition. We start out with the reasonable doubt instructions, and it's my understanding that the Court gave the pattern jury instructions. Is that correct?

Mr. Sheer: I believe so. I believe it is, Your Honor.

The Court: And it might be worthwhile for the Defendant to see the committee that put together those pattern jury instructions. They include the present U.S. District Judge Chasanow, the present U.S. Court of Appeals Judge Paul Niemeyer. Now, I may say, Judge Chasanow was for many years head of the Criminal Division of the Attorney General's Office.

I can't begin, and I don't have it in front of me, to enumerate all of the others. I know that Judge John McAuliffe was on it. Judge John McAuliffe was a very highly, highly regarded trial judge in Montgomery County and later served on the Court of Appeals.

Appendix E

It is virtually a who's who of the Maryland Bench and Bar from the standpoint of criminal matters. And not only do I think that they're right. The Court of Special Appeals I know has said, because I have said it for them and I know that others have said it, that judges are encouraged to use the pattern jury instructions rather than deviate from them. And my best recollection is that the Court of Appeals, which is the high court in the state, from which I'm retired, has said essentially the same thing.

Well, I don't think there's anything wrong insofar as the instructions are concerned. The presumption on innocence, again, my understanding — now, you're going to have to correct me if I'm wrong, but my understanding is that they were the pattern jury instructions.

Now, on the reckless endangerment proposition, I don't think that any double-jeopardy action arises there. I think there's a factor to be proven in reckless endangerment, that there are different factors to be proven, so far as, first-degree assault and reckless endangerment.

Now, what else were you pushing, counsel? Now, actually, I know there's an issue here about a motion in limine. Now, first of all, there is nothing, nothing in the Maryland Rules that provide for a motion in limine. It's commonly done, but there is no provision in the Rules. However, if there is a motion in limine and the motion is denied then counsel is still obliged to object at the time of trial. I see nothing here that indicate an inadequateness of counsel.

My understanding of *Strickland v. Washington*, 466 U.S. 668 (1984) is that there must be a showing that the counsel's performance fell below an objective standard of reasonableness and that the performance materially prejudiced him at trial.

Now, I don't see anything on the medical business. Well, if I had had an adequate pretrial memorandum, I might be better in going down this. But I find no bases for the Defendant's contentions here.

Now, let me say to counsel that when I came — when I first went on the Court of Appeals, the public defender was under the impression at that time that they had to present any contention that their people wanted them to, and this included coming down saying that there was insufficient evidence where there was two eyewitnesses to the crime. And we had a number of petitions which reached us in that day along that line. It wouldn't have hurt you to sit down and write out for my consideration beforehand what the contentions were so that I could have better followed them as I went along here.

I find, frankly, this to be a frivolous petition. The post conviction relief is denied.

s/ Marvin H. Smith — 1/4/01
MARVIN H. SMITH, JUDGE — DATE SIGNED:

APPENDIX F — DOCKET ENTRIES

CASE No. 9610 (4F5030)
9710020001336

Case No. 9610 (4F5030)
9710020013 36

CIRCUIT COURT FOR DORCHESTER COUNTY
CRIMINAL DOCKET

COUNSEL	TITLE	COSTS
MCM STATES ATTY.	STATE OF MARYLAND	
EBG MB Pub. Def.	KENNETH CHANTONE MANOKEY	

DOCKET ENTRIES

1997, Dec. 29th., Criminal Information fd. by States Atty. for Dor. Co. with Case Information Sheet; Instructions for service; Notice to Deft.; States Automatic Discovery & Request for Discovery.

Ct. 1. - Assault - 1st Deg.	Art. 27, Sec. 12A-1
Ct. 2 - Assault - 2nd Deg.	Art. 27, Sec. 12A
Ct. 3 - Deadly Weap.-Int/Injure	Art. 27, Sec. 36
Ct. 4 - Reckless Endangerment	Art. 27, Sec. 12A-2

BOND: $50,000.00

1997, Dec. 30th., Warrant w/copy of charging document and Notice of Assignment isd. to Sheriff for:
KENNETH CHANTONE MANOKEY - Warrant executed 12/31/97
1997, Dec. 30th., Notice of Assignment to all parties scheduling case as follows: Initial Appearance: January 15, 1998 at 9:00 A.M.; Readiness/Motions: March 5, 1998 at 9:00 A.M.; Jury Trial: April 22, 1998 at 9:00 A.M.
1998, Jan. 2nd, Letter to Warden Williams from State's Atty. for Deft.'s appearance on 1/15/98 at 9:00 a.m. for Initial Appearance; 3/5/98 at 9:00 a.m. for Readiness/Mts. Hearing and 4/22/98 at 9:00 a.m. for Jury Trial, fd.
1998, Jan. 5th, Transmittal of Record from District Court, fd.
Bond: $50,000.00 Not Posted
1998, Jan. 8th.; State's Supplement to Discovery, fd.
1998, Jan. 8th.; State's request for witnesses to testify, fd.; Subpoenas issued for:
03/05/98 at 9:00 A.M.
Pfc. Donald Johnson - Sd. 1/13/98
04/22/98 at 9:00 A.M.
Pfc. Donald Johnson - Sd. 1/13/98
Phyllis Smith - Sd. 2/16/98
Dr. Cacioppo Sd 01/19/98
1998, Jan. 12th, State's Motion to Amend Count Three with proposed Order, fd.
1998, Jan. 13th, Appearance of Michelle Barnes, Esq. entered on behalf of Deft., fd.
1998, Jan. 13th, Deft.'s Request for Discovery and Motion to Produce Documents, fd.
1998, Jan. 15th.; State's Answer to Defts' Motion for Discovery and Inspection, fd.
1998, Jan. 20th, Defc.'s Response to Motion to Amendment, fd.
1998, Jan. 20th, Demand of Kenneth Manokey, Deft., for Bill of Particulars, fd.
1998, Jan. 21st, Notice of State's Intention To Offer Certified Record Of Regularly Conducted Business Activity, fd.
1998, Jan. 21st, State's Supplement to Discovery, fd.

(Over)

Appendix F

STATE OF MARYLAND vs KENNETH CHANTONE MANOKEY

DOCKET ENTRIES

1998, Jan. 21st, Line to the Clerk to issue a subpoena for the following to appear to testify for the State on and issued 1/22/98, fd.
April 22, 1998 9:00 a.m.
Kathy Gootee (D.T.) - Sd. 2/2/98
1998, Jan. 22nd, State's Supplement to Discovery, fd.
1998, Jan. 22nd, State's Answer to Demand for Bill of Particulars, fd.
1998, Feb. 10th, Appearance of Ellen B. Grunden, Esq., entered on behalf of Deft., fd.
1998, Feb. 23rd, Deft.'s Motion to Suppress Statement with proposed Order, fd.
1998, Feb. 24th, State's Answer to Motion to Suppress, fd.
1998, Mar. 5th.; Present in Court: Asst St Atty D. Maloy; Deft w/counsel E. Grunden, Esq; Court Reporter R. Provencio; Courtroom Clark J. Marshall; Judge Donald F. Johnson, presiding.
Deft withdraws motion to Suppress.
Court grants State's Motion to Amend Charging Document - Count 3 - Change Name to Kenneth Chantone Manokay.
Deft and Counsel instructed to return for Trial on 04/22/98 at 9:00 A.M.
JUDGE: JOHNSON, DONALD F.
1998, Apr. 1st, State's Req. for a witness to testify 4/22/98, 9:00 A.M., fd. and subpoena isd. for:
Curtis Freeman Non Est 4/3/98
1998, Apr. 1st, State's Supplement to Disc., fd.
1998, Apr. 17th, Deft.'s Motion to Continue with proposed Order, fd.
1998, Apr. 17th, Judge's notation granting Deft.'s Motion to Continue.
JUDGE: JOHNSON, Donald F.
Copies issued.
1998, Apr. 20th, Line to the Clerk to issue a subpoena for the following to appear to testify for the State on and issued 4/20/98, fd.
April 22, 1998 at 9:00 a.m.
Curtis Freeman - Return for private process
1998, Apr. 29th, Notice of Assignment to all parties: Jury Trial 7/8/98, 9:00 a.m., fd.
1998, Apr. 28th., Letter to Clerk from Deft., fd.
1998, May 4th., Letter to Deft. from Clerk, fd.
1998, May 5th., Copy of Letter to Warden from St's Atty., fd.
1998, May 5th., St's Supplement to Discovery, fd.
1998, May 5th., St's request for witnesses to testify 7/8/98, 9:00 A.M., fd. & isd. for:

Pfc. Donald Johnson	Sd 5/20/98
Phyllis Smith	Sd 5/7/98
Dr. Cacioppo	Sd 5/22/98
Kathy Gootee	Sd 5/8/98
Curtis Freeman	Non Est 5/9/98
Walter Washington	Sd 5/7/98

1998, May 18th., Deft's Req. for witness to testify 7/8/98, 9:00 A.M., fd. & isd. for:
Curtis Freeman
1998, May 28th., St's Supplement to Discovery, fd.
1998, May 28th., St's Req. for witness to testify 7/8/98, 9:00 A.M., fd. & isd. for:
Sandra Ennals Sd 6/13/98
1998, June 9th, State's Supplement to Discovery, fd.
1998, June 9th, Line to the Clerk to issue a subpoena for the following to appear to testify for the State on and issued 6/9/98, fd.
July 8, 1998 at 9:00 a.m.
Carroll Robinson (Balto. Co.) - Sd. 6/11/98
1998, July 7th, State's Motion for Continuance w/proposed Order and attachment, fd.
1998, July 8th, Pr. in Ct.: K.Manokey w/counsel M. Barnes, Esq.; M.Maloney, Sts. Atty.; R.Provencio, Ct. Rpt.; J.Marshall, Ct. Clk.; Judge D.F. Johnson presiding.
Deft. objects to continuance.
Mt. for continuance is denied.
Defts. Mt. in Limine.
Ct. reserves ruling on Mt. in Limine.
Jurors sworn on Voir Dire.
Jury empaneled & sworn: (11,13,46,18,20,21,22,23,32,36,43,40,48)
Jurors excused for cause: 34,26,7,5,44,59,25,17,41.
Deft. used 7 strikes, 1 on alt.; State used 5 strikes.
Defts. Mt. to Sequester all witnesses. Mt. grtd.
At end of States case, Deft. makes Mt. for Judgment.
Mt. denied.
State's exhibits 1 thru 9, fd. (5,7,9 ID only)
At end of entire case, Deft. renews Mt. for Judgment.
Mt. denied as t Cts. 1 &2; Mt. grtd. as to Cts. 3 & 4.

** CONTINUED ON PAGE 165A **

Appendix F

NO. 9610 CRIMINAL -- STATE VS. KENNETH MANOKEY

1998, July 8th continued--

Verdict of the Jury:
First Degree Assault - Guilty
Second Degree Assault - merges into First Deg. Assault
Note from Jurors, fd.
Deft. requests sentencing be held at a later date. Mt. grtd.
State requests bond be increased.
Court increases bond to $100,000.00
Sts. Mt. to remove exhibits marked for identification only. Mt. denied.
Judge: Johnson, D.F.
States exhbiit #4 placed in exhibit room.

States proposed Voir Dire & Jury instructions, fd.
Defts. proposed Voir Dire & Jury instructions, fd.
1998, Jul. 16th.; Notice of Assignment as to Trial (sentencing) scheduled for 09/24/98 at 1:30 P.M., fd.
1998, July 17th., Copy of Letter to Warden from St's Atty., fd.
1998, Sept. 24th, Pst. in Ct.: Deft. with counsel M. Barnes, Esq.; M. Nelson, Asst. State's Atty.; R. Brooks, Ct. Rpt.; D. Hoge, Ct. Clk.; Judge Donald F. Johnson presidi
Letters on behalf of deft., fd.
Ct. imposes a sentence of 25 yrs. DOC, Ct. suspends last 5 yrs. Upon release, deft. placed on supervised Probation for 3 yrs. subject to standard conditions and special condition that he not have any contact with Phyllis Smith and he pay restitution in amt. of $7222.84 to parties listed on Reimbursement Statement in installments thru Parole and Probation.
Assault in 2nd Degree merges into First Deg. Assault.
Deft.'s Mt. for waiver of court costs and supervision fees. Mt. grd.
Order for Probation, fd.
Judgment of Restitution, fd.
JUDGE: JOHNSON, Donald F.
Commitment isd.
1998, Sept. 25th, Judgment of Restitution entered in favor of Dor. Gen. Hospital and against deft., Kenneth Chantone Manokey in amt. of $144.87
Judgment of Restitution entered in favor of Delmarva Orthopaedic Clinic and against deft. in amt. of $6,011.00.
Judgment of Restitution entered in favor of Freestate MA and against deft. in amt. of $1,066.97.
1998, Sep. 29th, Deft.'s Order for Appeal, fd.
1998, Sep. 30th, Copy of Order for Appeal and Docket Entries mailed to Dennis M. Henderson, Esq., Office of the Public Defender in Balcimore.
1998, Oct. 7th, Letter from Office Of The Public Defender to Court Reporter, fd.
1998, Oct. 9th, Deft.'s Order for Appeal, fd.
1998, Oct. 9th, Letter to Court Reporter from Office of Public Defender requesting preparation of transcript, fd.
1998, Oct. 13th, Copy of Order for Appeal and Docket Entries mailed to Dennis M. Henderson, Esq., Office of the Public Defender in Baltimore.
1998, Oct. 13th, Letter to Court Reporter from Office of the Public Defender requesting preparation of transcript, fd.
1998, Oct. 27th, Letter to Court Reporter from Office of Public Defender requesting preparation of transcript and notation thereon, fd. Copy of letter mailed to Ct. Rpt
1998, Nov. 2nd, Notice of Appearance for Appeal by Dennis M. Henderson, Esq., fd.
1998, Nov. 13th, Sentencing Hearing by Ramona Brooks, Court Reporter, fd.
1998, Nov. 16th, Deft.'s Motion for Modification of Sentence, fd.
1998, Nov. 18th, State's Answer to Deft.'s Motion for Modification, fd.
1998, Nov. 30th, Case along with Exhibits, except No 4 and certified copy of docket entries forwarded to the Court of Special Appeals by certified mail, return receipt requested. (Rec.#Z148111147)
Also copy of Index and certified copy of docket entries forwarded to attys. in cause.
1998, Dec. 7th., Receipt of Court of Special Appeals, fd.
1998, Dec. 7th., Order of Court that Mt. for Modification is Denied.
JUDGE: JOHNSON, Donald F.
Copies isd.